

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

THIS DOCUMENT RELATES TO:

*County of Lake, Ohio v. Purdue
Pharma L.P., et al.,
Case No. 18-op-45032*

*County of Trumbull, Ohio v. Purdue
Pharma, L.P., et al.,
Case No. 18-op-45079*

**MDL No. 2804
Case No. 17-md-2804
Judge Dan Aaron Polster**

**PHARMACY DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO COMPEL LIMITED ADDITIONAL DATA FROM THE
OHIO BOARD OF PHARMACY'S OARRS DATABASE**

The Board of Pharmacy's response to the Pharmacy Defendants' motion to compel OARRS data in Track 3 (a motion the Court granted in Track 1B, Dkt. 3168) continues to miss the mark in three critical ways.

First, the Board's argument relies on the misconception that some legal privilege applies to the limited data the pharmacies seek from OARRS, but it never states what that privilege might be. The Board cites cases (e.g., Opp. at 6) where litigants invoked the physician-patient privilege, the marital privilege, and a statutory mediation privilege, among others, but none of those privileges applies here. The Board offers no argument whatsoever for the application of *any* substantive legal privilege. To the extent the Board means to suggest that its statutory confidentiality claims are somehow equivalent to a substantive privilege claim, the Board has not made—and cannot make—any such showing. “[C]onfidentiality is not the same as privilege.” *S.E.C. v. McCabe*, 2015 WL 2452937, at *5 (D. Utah May 22, 2015).¹

Moreover, as the Board is well aware, the Pharmacy Defendants do not seek patient names, addresses, birthdates, or any other protected patient information. The only data the Pharmacy Defendants seek are the prescribers and pharmacies associated with the relevant prescriptions in the OARRS database.² Therefore, the state and federal laws the Board relies upon—which are premised entirely on the concern that disclosure of data would allow identification of patients—do not apply. They certainly do not justify the Board's refusal to produce the data.

¹ The Board's confidentiality arguments also ignore the fact that, in 2019, a wide variety of people accessed OARRS more than 240 million times, including thousands of healthcare providers, professional licensing boards, law enforcement personnel, drug court personnel, and hospital peer review committees. See OARRS 2019 Annual Report at 2, 3, 10, available at [https://www.ohiopmp.gov/documents/Annual%20Report%20\(2019\).pdf](https://www.ohiopmp.gov/documents/Annual%20Report%20(2019).pdf).

² The Board asserts that the pharmacies seek pharmacy and prescriber information for *all* prescriptions in the OARRS database. (Opp. at 10.) That is not correct. The Pharmacy Defendants' Track 3 subpoena is limited to prescriptions for a specific list of medications, the same list that the Court has ordered the pharmacies to produce from their own data. Testosterone, Ambien, and Ritalin, for example, are not on that list.

The Board's confidentiality concerns are properly addressed by ordering production pursuant to a protective order, not by the withholding of data that is critical to the Pharmacy Defendants' defense. The Court has repeatedly ordered the pharmacies to produce the very same data from their own databases for the entire state of Ohio. *See* Dkt. 2976, Dkt. 3055, Dkt. 3341. The Court also has ruled that the protective orders in this case are sufficient to protect that data. *See* Dkt. 3055 at 2 ("The Court has put into place numerous protective orders specifically addressing health information protected under the Health Insurance Portability and Accountability Act ('HIPAA'), such as patient prescriptions.").³

Second, because there is no privilege claim at issue, there is no need to address whether state or federal law supplies the "rule of decision." The Federal Rules of Civil Procedure—Rule 45, in particular—indisputably govern whether the Board must produce the data in question. The Board has not met its burden to show good cause for resisting the subpoena. In fact, the Board says nothing at all about any burden that would result from having to produce the requested data, effectively conceding that the burden is slight or nonexistent.

Third, the Board continues to misconstrue the nature of the data the Pharmacy Defendants seek, why the pharmacies need it, and what the pharmacies plan to do with it. The pharmacies need to know the prescribers and dispensers associated with the relevant prescriptions in order to identify the doctors and pharmacies that may have actually caused the opioids crisis in Lake and Trumbull Counties as alleged by plaintiffs. This data will **not** reveal the identity of any patient and is critical to the pharmacies' defense of alternative causation.

³ The State of New York produced its PDMP data—including names of doctors and pharmacies associated with prescriptions—in the consolidated New York opioids litigation pursuant to similar protective order provisions. *See* Ex. 1, Keller Tr. 268:20-270:25; Ex. 2, NY Protective Order.

The Board suggests that the Pharmacy Defendants intend to violate the confidentiality of their own patients' sensitive health information in order to "reverse engineer" the identity of patients in the OARRS data. (Opp. at 11.) The accusation is baseless. Just the opposite, the Pharmacy Defendants have fought to *avoid* disclosing their patients' protected information, because patient privacy is critical to the Pharmacy Defendants and required by law.

Moreover, the Board ignores the fact that Plaintiffs chose not to sue approximately 42 percent of the dispensing market in Lake and Trumbull Counties. The Pharmacy Defendants do not have any dispensing data from that significant portion of the market. The Pharmacy Defendants' own dispensing data does nothing to fill that gap. Nor does the data that the Board has already produced, as illustrated by the chart at page 12 of the Board's opposition brief:

DateFilled	01/01/2015
RxNumber	123456
RefillCode	0
Quantity	30
DaysSupp	30
NDC	54092038101
Drug	ADDERALL XR 5 MG CER
TherClassCode	2820040010
TherClassDesc	Amphetamine & Comb.
DateWritten	01/01/2015
NumOfRefillsAuth	0
PaymentType	4
PharmacyHash	1111AAAAA11AA1111A11AA1AA11AA1111AAAAA
PharmacyZip	445
PharmacyBACCode	A
PharmacyBACSubCode	3
PrescriberHash ⁵	1AA11AA111A1111AA11111AA11A11111AA111A1
PrescriberZip	445
PrescriberBACCode	C
PrescriberBACSubCode	
PrescriberSpecialty	Pediatric medicine
PatientGroupIDHash	A1A1111A11111A11AAAAAA1AA11111A11111A11A1
PatientAge	8
PatientSex	2
PatientZip	445

The Pharmacy Defendants cannot do anything with this data to identify the doctors and pharmacies who may have contributed to the opioids crisis alleged by plaintiffs.

The Board has nothing to say about other ways the Pharmacy Defendants might obtain this information and does not even respond to the argument that it would be impossible under the Court's schedule to obtain it from the dozens of third-party pharmacies plaintiffs chose not to sue in this litigation. In effect, the Board concedes that OARRS is the only source of the information the Pharmacy Defendants need.

Because the data in question is not protected patient information, because OARRS is the only source of that data, and because the Pharmacy Defendants' "need for the data in this litigation outweighs any countervailing concerns," Dkt. 3168 at 7, the Court should grant the Pharmacy Defendants' motion to compel.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record on July 22, 2020.

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